IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20/11/2004

CORAM

THE HONOURABLE MR. JUSTICE N.V.BALASUBRAMANIAN
AND
THE HONOURABLE MRS. JUSTICE R. BANUMATHI

APPEAL SUIT No.1323 of 1989
and
C.M.P.No.16427 of 1989

S.Ameer ... Appellant /
Plaintiff

-Vs-

M/s. Vivek Enterprises,
rep. By its Sole Proprietor ... Respondent /
Mr.R.Kaliaperumal. Defendant.

This appeal is filed against the Judgment and Decree dated:
03.04.1 989 made in O.S.No.418 of 1986 on the file of Principal Subordinate Judge, Pondicherry.

!For Appellant : Mr. S.Krishnasamy

^For Respondent : Mr. A.Chidambaram

:J U D G M E N T

R.BANUMATHI,J

This Appeal is preferred at the instance of unsuccessful Plaintiff in O.S.No.418 of 1986 on the file of Principal Subordinate Judge, Pondicherry. The learned trial Judge has dismissed the Plaintiff's suit on the Preliminary Issue that the suit is not sufficiently stamped and that the suit claim is unsustainable on the foot of the suit instrument.

2. Case of Appellant / Plaintiff is that the Respondent / Defendant borrowed Rs.50,000/- on 01.12.1985 from the Plaintiff for purchase of exhibition rights of the Film "Rajarishee" and the Defendant has agreed to repay the said amount with interest at the rate of 12% per annum by 01.06.1986 and executed the suit Promissory Note and thereafter Defendant failed to repay the same and hence the suit.

3. Denying the claim of the Plaintiff, Defendant has filed

Written Statement interalia contending that he was doing Toddy and Arrack business. In that connection, the Plaintiff used to purchase empty bottles from the Defendant as well as from others recommended by the Defendant. Further case of Defendant is that in November 1985, Defendant had asked the Plaintiff to lend money for starting Film Distribution Trade and without parting with the money, Defendant's signature was taken in the paper. The Defendant has mainly contended that the suit document is not a Promissory Note as described under S.4 of Negotiable Instruments Act and that the suit cannot be filed on the said document. No consideration was passed to Defendant on 01.12.1985 and there is no cause of action for the suit. Due to misunderstanding in the Trade of Empty Bottles, the Plaintiff has filed the vexatious suit and the suit is not maintainable.

4. On the basis of the above pleadings, five Issues were framed in the trial Court. The first Issue "Whether the suit document is not valid and enforceable in law ? " was taken up as the Preliminary Issue. On that Issue, the learned Principal Subordinate Judge has dismissed the suit finding that the impugned document is a Promissory Note within the meaning of S.4 of N.I. Act. Pointing out the recitals in the Impugned Document that the Amount is payable by 01.06.1986, the trial Court found that for the purpose of Stamp Duty, the Impugned Document is covered under Cla.(b)(ii) of Art.13 of the Stamp Act. Since the amount is payable on demand which falls under Cla.(b) of Art.49 of the Stamp Act, the learned trial Judge has dismissed the suit as unsustainable.

5. Aggrieved over the dismissal of the suit on the Preliminary Issue of maintainability of the suit, Plaintiff has filed this appeal. Learned counsel for the Appellant / Plaintiff has contended that the Court below erred in dismissing the suit on the Preliminary Issue itself without taking the fair trial. Submitting that the Impugned Document dated 01.12.1985 is a Promissory Note which would attract Art.49(a)(ii) of the Stamp Act and not Art.49(b) of the Stamp Act, it is further contended that the trial Court has not properly appreciated the decision reported in 1971 (1) M.L.J. 214. It is further submitted that in any event, the trial Court ought to have decreed the suit by treating the said document as a " Receipt " based on the original cause of action.

6. Per contra learned counsel for the Respondent / Defendant has submitted that in view of the recital in the Impugned Document to the effect that the amount is payable by 01.06.1986, only Cla.(b) of Art.4 9 of the Stamp Act is applicable and that the findings of the trial Court are well balanced and that there is no reason warranting interference.

7. We have carefully considered the submissions of both sides, Judgment of the trial Court and the materials on record. In such consideration, the point following points arise for our consideration:-

1. Whether the trial Court was justified in taking the view that the suit document is a Promissory Note; but inadmissible in evidence on the ground that the said document was not duly stamped as required by law ?

2. Without setting forth the alternative plea can the Plaintiff fall back upon the original cause of action and make the suit claim ?

3. Whether the learned trial Judge was right in non-suiting the Plaintiff on the Preliminary Issue ?

8. Point No.1:-
For better appreciation of the contentious points urged, we may quote the relevant portion of the Impugned Document:-

" tpGg;g[uk; efuk; No.42 ehaf;fd; njhg;g[K. nc&f; $hd; KfkJ kfd; S. mkPh; vd;gthplkpUe;J. uh$hpc&p glk; th';Ftjw;fhf ehsJ njjpapy; ehd; bgw;Wf; bfhz;l buhf;fk; U:/50.000-? (U:gha; Ik;gjpdhapuk; kl;Lk;)/ nkw;go gzj;ij S. mkPnuh my;yJ mthpd; mjpfhuk; bgw;wtnuh ahh; nfl;gpDk; 1?6?86f;Fs; mjw;F chpa tl;o 100f;F 1 U:gha; tPjk; mrnyhL nrh;e;j tl;oa[ld; bfhLf;f ehd; rk;kjpj;J vGjpf; bfhLj;j urPJ/
tpntf; vz;lh;gpiur!;fhf.

20 P 20 P
Sd/- R.fypabgUkhs;

The document is stamped with Revenue Stamps of 40 Paise. (20 P. Plus 20 P.). The Defendant has denied the borrowing of the amount from the Plaintiff; however, the Defendant has admitted his signature in the Impugned Document. The Defendant / Executant of the document has described the document as "Receipt". Though it is described as a " Receipt", it is clearly provided in the Impugned Document that the amount is payable on demand before 01.06.1986. Thus the amount is not payable immediately; but payable on demand only before 01.06.1986.

9. S.4 of N.I. Act describes Promissory Note as under:-

4. " Promissory Note"
A "Promissory Note" is an instrument in writing (not being a bank-note or a currency-note) containing an unconditional undertaking signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to be bearer of the instrument.

10. As per S.2 (22) of the Stamp Act, definition of the Promissory Note reads thus:-

(22) Promissory Note.-- "Promissory Note" means a promissory note as defined by the Negotiable Instruments Act, 1881;

It also includes a note promising the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen;

With the above definitions we have to firstly consider whether the document in question is a Promissory Note.

11. In order to find out whether the particular document is promissory note or not, the intention of the parties at the time of execution of the document is to be looked into with reference to the substance of the document, the surrounding circumstances in which the document had been executed and its negotiability in the popular sense, whether the document was intended to be promissory note or was intended to be a mere acknowledgment of debt or receipt of consideration. We have carefully read the recitals of the Impugned Document to cull out the intention of the parties so as to decide whether the instrument is a promissory note or not.

12. As we have pointed out earlier, the recitals nkw;go gzj;ij S. mkPnuh my;yJ mthpd; mjpfhuk; bgw;wtnuh ahh; nfl;gpDk; 1?6?86f;Fs; mjw;F chpa tl;o 100f;F 1 U:gha; tPjk; mrnyhL nrh;e;j tl;oa[ld; bfhLf;f ehd; rk;kjpj;J vGjpf; bfhLj;j urPJ are emphatic. That the amount is payable to Plaintiff - Ameer or to others who has the authority from Ameer clerly shows the negotiability of the instrument. Thus the amount payable under the Impugned Document is payable on demand either to Plaintiff - Ameer or who has the authority from the Plaintiff - Ameer. The amount is payable on demand which clearly shows that the document is a Promissory Note within the meaning of S.4 of N.I.Act. Hence we confirm the findings of the trial Court that the Impugned Document is a Promissory Note.

13. The amount due on the Promissory Note may be payable on demand or payable after a certain period. The amount on the Impugned Document is not payable immediately on demand; but was made payable before 01.06.1986, i.e., no immediate demand could be made since the Defendant has the time to pay till 01.06.1986. Since the amount is not immediately payable on demand, but payable otherwise than on demand, the learned trial Judge found that the document falls under Cla.(b) of Art.49 of Sch.I of the Stamp Act. The correctness of this finding is very much assailed by the Appellant / Plaintiff contending that the trial Court erred in finding that the amount on the document is payable otherwise than on demand.

14. Art.49 of Sch.I of the Stamp Act is as follows:-

49. Promissory Note as defined by S. 2(22) --

(a) When payable on demand --

(i) When the amount or value does not exceed Rs.250; (Ten Paise)

(ii) When the amount or value exceeds Rs.250 but does not exceed Rs.1,000; (Fifteen paise)

(iii)in any other case; (Twenty-Five Paise)

(b) when payable otherwise than on demand Bill of Exchange (No.13) for the same amount payable The same duty as a

otherwise than on
demand)

The definition of Promissory Note under the Stamp Act is wider than that of S.4 of N.I. Act. In this case, the amount is not payable immediately on demand; but payable before 01.06.1986 since the amount is payable otherwise than on demand. The document is chargeable with higher duty i.e., Stamp Duty is payable under Art.49 (b) of Sch.I of the Stamp Act.

15. Under Art.49 (b) of Stamp Act, for the instrument " when payable otherwise than on demand ", the Stamp Duty is payable as " the same duty as a Bill of Exchange (No.13) for the same amount payable otherwise than on demand ". Art.13 of the Stamp Act deals with Bill of Exchange. As per Art.13, for a Bill of Exchange, Stamp Duty is payable as indicated therein for the time slab. In the instant case, the amount is payable within one year period. For this case, Art.13(ii) of Stamp Act is relevant to be quoted.

13. Bill of exchange, as defined by S.2 (2) not being a bond, bank note or currency-note.

(a) [Omitted]

(b) where payable otherwise than
on demand--

(i) ...

(ii) Where payable more than three
months but not more than six
months after date or sight--

if the amount of the bill or [Two rupees fifty
note does not exceed Rs.500; paise]

if it exceeds Rs.500 but does [Five rupees]
not exceed Rs.1,000;

and for every additional [Five rupees]
Rs.1,000 or part thereof in
excess of Rs.1,000;

In this case, since the amount is payable otherwise than on demand, the Stamp Duty payable is the same duty as a Bill of Exchange [Art.13 (ii)] for the amount payable. To make it clear, on the amount of Rs.50,000/- the Stamp Duty of Rs.2,455/- (Rs.5/- Plus Rs.2,450/-) ought to have been calculated as per Art.13(ii) of t he Stamp Act. Obviously, the Impugned Document is executed in the paper affixed with 40 Paise Revenue Stamp. The Impugned Document is not sufficiently stamped. The learned trial Judge has rightly found that the document is covered under Cla.(b) (ii) of Art.13 of the Stamp Act and that the document is insufficiently stamped.

16. Since the document is insufficiently stamped, the same cannot be admitted in evidence. S.35 of the Stamp Act prohibits admission of any such document in evidence. Under S.35 of the Stamp Act, an instrument shall not be admitted in evidence "unless such instrument is duly stamped". The Act clearly imposes upon the Court the duty of seeing in every case whether an instrument presented before it is duly stamped or, not. "Duly stamped" is defined in the Act to be " stamped in accordance with the law in force when such instrument is executed or first executed". The Act lays down that "all instruments chargeable with duty and executed by any person in India shall be stamped before or at the time of execution". If an instrument is not so stamped, clearly it is not stamped according to the Act and cannot be held therefore to be duly stamped. As demonstrated earlier, the impugned document not being duly stamped as per Art.13(ii) of Stamp Act but only executed with revenue stamp of 40 Paise cannot be admitted in evidence. S.35 would be an embargo to admit the document. The learned trial Judge has rightly found that S.35 prohibits admission of the suit document since it is not duly stamped.

17. Almost a similar factual situation arose in the case relied upon by the Respondent / Defendant reported in A.I.R. 1971 Mad 290 - Thenappa Chettiar v. Andivappa Chettiar. In that case, the suit document provided that the executant shall pay the amount in question to the creditor after two years on demand by the creditor with interest. In para 8 of the Judgment, Venkataraman, J speaking for the Court held that the suit promissory note could not be considered as a promissory note payable on demand. The Court came to the conclusion that the suit promissory note was a promissory note payable otherwise than on demand and the document could not be validated by payment of penalty and the same was inadmissible for all purposes. In para 5 of his Judgment, Venkataraman J. referred to the case of Alamelu Ammal v. Rangai Gounder reported in A.I.R. 1945 Mad 42 and number of other decisions. The Division Bench held that the amount on the note was payable otherwise on demand. Pointing out that the document was stamped with the Revenue Stamps 25 Paise (15 P. Plus 10 P.), the Division Bench held that the document was insufficiently stamped and the same cannot be admitted in evidence. The ratio of the aforesaid decision is clearly applicable to the suit document on which the amount is payable otherwise than on demand; document is insufficiently stamped with Revenue Stamps of 40 Paise (20 P. Plus 20 P.). We confirm the findings of the trial Court that the suit document is a Promissory Note but inadmissible in evidence on the ground that the suit document was not duly stamped and Point No.1 is answered accordingly.

18. Points No.2 and 3:-
The main contention of the Appellant / Plaintiff is that the Impugned Document could be construed as a " Receipt " and that the Plaintiff is entitled to claim on the original cause of action. To substantiate this contention, Appellant / Plaintiff has already filed an Amendment Petition in C.M.P.No.16427 of 1989 before this Court. By careful reading of the averments in the affidavit and the amendment sought for, we find that the proposed amendment sought for is only in the prayer column. No amendment is sought for in the averments regarding original cause of action. Merely by making amendment in the plaint prayer, the Plaintiff cannot fall back upon the original cause of action. Further the proposed amendment is

sought for in the Appellate Stage, which is highly belated. If the proposed amendment is allowed, it would relate back to the date of the suit and the claim might be barred by limitation.

19. The appellant / Plaintiff having claimed upon a Promissory Note, which is invalid for want of stamp is not debarred from claiming upon any ground of cause of action which he can prove without the aid of the note; in other words, the plaintiff could give other evidence of consideration paid by him to the defendant. Excepting the Impugned Document, no other evidence of consideration is adduced by the Appellant / Plaintiff. Hence, the Plaintiff is precluded from making claim on the original cause of action. Where Plaintiff files a suit on a Promissory Note, it is open to him to put his case in an alternative form and sue for money on basis of original consideration. But if he does not base his case in the plaint on the original consideration, he is out of Court because the Promissory Note is inadmissible in evidence being insufficiently stamped. We find in this case the pleadings are not properly framed for the purpose of enabling the Plaintiff to recover the amount on the original consideration. The Plaintiff has neither set forth the facts nor pleaded the circumstances giving rise to the alternative plea / claim to recover the amount on the original loan. One is to search in vain the plaint averments putting forth alternative claim on the original cause of action. The amount is said to have been advanced for purchase of Distribution Rights of Film "Rajarishee". There is no prior debt. We find no averments in the plaint setting forth facts as to the original consideration. The permission to amend the plaint is also to be refused since the effect of amendment would be taken away from the Defendant a legal right which has accrued to him by the lapse of time by passing of the decree. Hence the petition for amendment in C.M.P.No.16427 of 1989 is liable to be dismissed.

20. In careful analysis of the evidence and materials on record, we find that the learned Principal Subordinate Judge, Pondicherry has rightly found that the Impugned Document is a Promissory Note on which amount is payable otherwise than on demand. Further the learned trial Judge has also rightly found that the Impugned Document is insufficiently stamped and cannot be admitted in evidence. The suit claim based on the insufficiently stamped Promissory Note is unsustainable. This appeal is bereft of merits and is bound to fail.

21. A.S.No.1323 of 1989:-
Therefore, the Judgment and Decree of the Principal Subordinate Judge, Pondicherry dismissing the suit in O.S.No.418 of 1986 (Dated: 03.04.1989) are confirmed and this appeal is dismissed. In the circumstances of the case, there is no order as to costs.

22. C.M.P.No.16427 of 1989:-
For the reasons stated above, this petition is dismissed.

(N.V.B,J) (R.B.I,J)

.11.2004.

Index: Yes

Internet: Yes

sbi

To

1. The Principal Subordinate Judge,
Pondicherry.

2. The Record Keeper,
V.R.Records, High Court,
Madras.